Multimodal Concurrency Study

(2SHB 1565, 2005 Session)

Legal Context & Statutes Related to Concurrency

TASK 4: TECHNICAL MEMO

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by

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INTRODUCTION

This briefing paper provides a general background of the legal context within which one can assess how current state laws support implementation of multi-modal transportation concurrency in the State of Washington. Concurrency – the concept of ensuring that public infrastructure supports development as it occurs[1] – was introduced as a goal in the Growth Management Act (GMA) adopted by the Washington Legislature in 1990. This briefing paper briefly introduces the GMA and highlights the relevance of concurrency to the GMA. It then addresses the two major components of concurrency: "level of service" and "trip accommodation." Each of these major components are described in terms of location of powers, followed by a brief discussion of current implementation and notes on legal powers still available for better support of multi-modalism. The paper then includes a short discussion of land-use and inter-jurisdictional cooperation powers that local jurisdictions could use to further multi-modal concurrency.

Despite being an important part of the GMA, concurrency has not been a major subject of extensive formal legal review by the Growth Management Hearings Board nor the courts. With this in mind, this concurrency review rests heavily on the text of the Revised Code of Washington (RCW) and the Washington Administrative Code (WAC). Where appropriate, local implementation of concurrency are used as illustrations of key points.

THE GROWTH MANAGEMENT ACT

In response to the surging population growth of the 1980s, the Washington state legislature adopted the GMA to preserve rural, resource, and ecological lands while encouraging coordinated, planned urban growth. [See RCW 36.70A.010-020.] Under the GMA, populous or fast growing counties and the cities they contain are required to produce comprehensive plans reflecting a consistent approach to a wide variety of government actions. [RCW 36.70A.040.] Presently, 29 of Washington's 39 counties are dealing with concurrency in their planning under the GMA.

The first three goals announced in the GMA are to promote urban growth, reduce sprawl, and encourage multi-modal transportation. [RCW § 35.70A.020(1), (2), (3).] Local jurisdictions are expected to realize these goals by adapting them to the situation on the ground. [Id.] Where the goals are in conflict, local jurisdictions are empowered to emphasize one goal or more goals at the expense of others. The resulting effect is a requirement that a planning process be followed but not that a particular outcome be reached. [West Seattle Defense Fund v. City of Seattle (WSDF I), CPSGMHB Case No. 94-3-0016 (4316), FDO, at 60 (1994).]

The GMA requires local governments to assure that sufficient transportation capacity exist to accommodate proposed new or expanded development, consistent with standards for transportation system performance that are also to be defined by local governments. [RCW § 36.70A.070(6)(b).] In meeting this requirement, a local government first

[1] In other jurisdictions, this type of provision is referred to as an Adequate Public Facilities Ordinance (APFO).

decides what transportation options are locally important for its own communities to achieve desired transportation system performance. Then the jurisdiction decides what balance between supply and demand is appropriate for its community. Once the balance is chosen, the government must enforce this by denying permits for any development that does not maintain this balance. [Id.] Development can still continue in locally congested areas if an improvement or strategy is in place at the time of the development to accommodate the new travel demand or if such improvement or strategy will be completed within six years and is predicted to all the transportation system to meet the local system performance standard. [Id.]

A jurisdiction makes the following types of decisions to conduct this "supply-demand" assessment for new or expanded development proposals. 1) It defines the types of transportation option/strategies it is willing to supply. (This can also be viewed as the "amount" of transportation service it will supply.) 2) It determines how quickly those services will be improved from their current condition to their planned condition. (This is a fiscally constrained development plan.) 3) It determines how to measure the effectiveness (performance or level of service) of those services. 4) It sets the acceptable level of service that must be met if new development is to be permitted.

If a proposed development produces more travel demand than can be accommodated by the fiscally planned transportation services, within the levels of service adopted, the new development may not be approved. To approve that development, the jurisdiction can 1) arrange for the funding of additional transportation services that allow the existing performance standard to be met/maintained, or 2) adopt a less stringent level of transportation system performance.

THE LEVEL OF SERVICE REQUIREMENT

Description

The GMA requires local jurisdictions to define what it will accept as "adequate" for its "level of service" or LOS (transportation system performance) by establishing a level of service (LOS) methodology and standard for arterials, transit routes, and locally owned transit facilities. [RCW §§ 36.70A.070(6)(a)(iii)(B), 36.70A.070(6)(b).] A LOS methodology is simply a technically objective way to quantify transportation system performance. [WAC 365-195-210.] The GMA does not set a baseline standard for local jurisdictions, but it does require them to set one for themselves. [WSDF I, FDO, at 60.]

Location of Decision Powers

Control over the LOS components is held locally. The transportation element of the local comprehensive plan is required to be found consistent with countywide and regional transportation policies and plans, countywide policies and the state's six-year transportation plan. The only marginally direct relationship to oversight of LOS is assigned to the regional transportation planning organization (RTPO). [RCW § 36.70.070(6)(c).] The RTPO is tasked with reviewing, but not changing, local LOS

methodologies to promote a regionally consistent evaluation of transportation facilities and corridors. [RCW § 47.80.023(7).]

Jurisdictions may change or update their LOS standards by following the rules governing comprehensive plan changes, including public participation requirements. The entire comprehensive plan must be reviewed every seven years. Partial updates may be issued once a year, although a more frequent update may be performed under certain specified conditions. [RCW §§ 36.70A.130(4), (2)(a), (2)(b).] In general, changes to the comprehensive plan or development regulations must be submitted to the state's Department of Community, Trade, and Economic Development at least 60 days prior to adoption. [RCW 36.70A.106.]

Changes to the LOS methodology may be made at any time, since only the standard itself is a required element of the comprehensive plan. [Sammamish Cmty. Council v. Bellevue, 108 Wn. App. 46, 56 (2001).] Jurisdictions may change both the technical manner in which LOS is measured and the transportation facilities selected for measurement. [Montlake Cmty. Club v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 110 Wn. App. 731, 739-40 (2002).]

Present Implementation

Most jurisdictions use some variation of a mathematical volume-over-capacity ratio (V/C) as their LOS methodology. Such V/C ratios for roadways typically measure whether or not the physical character or geometry of the roadway provides sufficient capacity for the number of vehicles attempting to use the roadway. [City of Bellevue v. E. Bellevue Cmty. Mun. Corp., 119 Wn. App. 405, 411 (2003).]

Local jurisdictions have adopted a variety of tailored LOS standards. Some cities, such as Seattle, have decided that it is acceptable to allow higher levels of congestion, as defined by traditional roadway level of service definitions. [Seattle Municipal Code Exhibit 23.52.004 B.] Other cites have set their baseline for acceptable flows of traffic (desired system performance levels) closer to free flowing traffic. [See, e.g., Issaquah Municipal Code 18.15.220(38).] Many jurisdictions use different standards for different geographic areas, e.g., tolerating greater congestion in the commercial core than in residential neighborhoods. [See, e.g., Bellevue Municipal Code 14.10.030(A).]

Opportunities for Expanded Implementation

Importantly, the various forms of implementation for LOS methods and standards are entitled to the presumption of validity. [RCW 36.70A.3201.] When challenged in court, they can only be overcome by clear and convincing evidence, not a mere preponderance of evidence. [Id.]

Localities have the power to create LOS methodologies reflecting varied transportation choices. Jurisdictions are encouraged, but not required, to innovate and find new ways to measure their traffic and travel needs. [WAC 365-195-325(2)(e), RCW § 36.70A.108(1)(b).] More jurisdictions could adopt models like Renton's, which uses a

weighted average of travel distance achieved during a half-hour by three travel modes, single-occupancy vehicles, high-occupancy vehicles, and buses. [Renton 2004 Comprehensive Plan pg XI-20.]

Additionally, jurisdictions have the discretion to select the aspect(s) of transportation mode(s) to measure. WAC 365-195-210 provides, "[s]tandards may be expressed in terms such as speed and travel time, freedom to maneuver, traffic interruptions, comfort, convenience, geographic accessibility, and safety." Renton's model focuses on speed, whereas Vancouver's uses a mix of average corridor travel speed, the time it takes to clear specified intersections, and a mobility index measuring groups of intersections. [Id, Vancouver Mun. Code 11.05.030(A)(2),(8),(9).]

TRIP ACCOMODATION REQUIREMENT

Description

If the travel resulting from a proposed development is projected to increase traffic on locally owned facilities beyond the LOS standard locally defined for such facilities, then the jurisdiction must deny the development unless improvements or strategies to accommodate the new trips are committed to be in place within six years. [RCW 36.70A.070(6)(b), WAC 365-195-835(3)(d)(iii).] Local jurisdictions are required to adopt development regulations that enforce the denial or accommodation requirement. [RCW 36.70A.070(6)(b).] Strategies to address these new travel needs may include increased public transportation service, ride sharing programs, travel demand management, and other transportation systems management strategies. [Id.] Multi-modal improvements and strategies are specifically authorized again later in the code. [RCW 36.70A.108(1).]

If improvements or strategies are not in place at the time of the development, then a financial commitment must exist to complete them within six years. [RCW 36.70A.070(6)(b).] The word "complete" in the statute is unclear in relation to service-based accommodations. By their very nature, service accommodations are an ongoing process, unlike physical improvements that have a more objective completion point.

A jurisdiction may establish a minimum number of new trips required to trigger concurrency enforcement. A development generating a handful of trips may not require evaluation or mitigation if the jurisdiction's local process shows it will acknowledge and include such minor trips as part of later system reviews. [See Progress Clark County, Inc., et al. v. City of Vancouver; Order Finding Compliance; WWGMHB (October 30, 2003) (Approving Vancouver Muni. Code 11.95.080, which exempts developments creating 10 or fewer trips from concurrency requirements but includes the new trips as part of the city's annual concurrency review).]

Additionally, jurisdictions may approve a development if the local LOS standard would allow the development even though the development could cause a state or adjacent jurisdiction's facility to fail under their applicable LOS test. [See RCW

36.70A.070(6)(b).] For certain state facilities, local jurisdictions are legally prevented from denying development for causing traffic burdens on those roads. [RCW 36.70A.070(6)(a)(iii)(C).]

For developments generating more than a handful of new trips, the standard must be consistently applied, and no variance may be granted. [Bellevue, 119 Wn. App. at 414.] A jurisdiction may change the LOS standard in order to allow more congestion in an area, but it may not allow individually selected developments or developers to be exempted from standards it still enforces on others. [Id.]

Improvements and strategies required by concurrency are separate and distinct from development impact fees. Impact fees can be assessed whenever a development relies on public facilities; concurrency mitigation is only required when the development would overburden those facilities. Impact fees may be spent by the jurisdiction according to its own priorities; concurrency mitigation must directly accommodate the new trips created by the development. Concurrency mitigation fees must accommodate the new trips within six years. [Thomas M. Walsh and Roger A. Pearce, The Concurrency Requirement of the Growth Management Act, 16 U. Puget Sound L. Rev. 1025, 1026-7 (1993).]

Location of Decision Powers

Local jurisdictions have sole authority to approve strategies or improvements necessary to accommodate development. Decisions on how to accommodate the increased demand are often made on a case-by-case basis, but they may be informed by identified local needs in the transportation element. . [RCW 36.70A.070(6)(a)(iii)(F).]

While local jurisdictions are empowered to approve service-based concurrency mitigation, it is rare for a jurisdiction to directly control the provision of transit service within its borders. Instead, most jurisdictions receive transit service from a provider organized under a Public Transportation Benefit Area (PTBA) that usually has a geography much larger than a single city.(Chapter 35.57A RCW).[2] [Washington State Transportation Resource Manual (Updated January 2005), pg. 297.] PTBAs are governed by a collection of representatives from the areas they serve. [RCW 36.57A.050.] As independent organizations, the governing board oversees the operations and management of the PTBAs, but the PTBAs are free to set routes and schedules without giving direct deference to their constituent jurisdictions or the adopted comprehensive plans of those jurisdictions. [RCW 36.57A.080.]

Present Use

Improvements and strategies are determined on a case-by-case basis in each jurisdiction, but most focus on improving physical facilities. [Puget Sound Regional Council, Assessing the Effectiveness of Concurrency: Phase 2 Report – Analysis of Practices, pg.

[2] There are six exceptions. The cities of Everett, Yakima and Pullman run their own municipal systems, and the counties of Garfield, Grays Harbor, and King operate systems under different authorizing statutes. The counties maintain control of both land use and public transportation in their unincorporated areas. [Washington State Transportation Resource Manual (Updated January 2005), pg. 297.]

52 (2002).] Many jurisdictions use a "pay-and-go" approach, whereby the developer pays a portion of the costs of the mitigation, and the jurisdiction assumes the responsibility for implementing the accommodations. [Id.]

Jurisdictions using service-based accommodations currently favor travel demand management (TDM) strategies, because these are more capable of being locally-controlled as they are typically applied to a local development. [Id, pg. 53.] To address the possibility of future funding shortfalls, Issaquah makes TDM a condition of the permit that then runs with the development. [Id.]

Opportunities for Expanded Implementation

Localities are not limited to physical improvements and may use increased service offerings as a strategy to accommodate development. Additionally, the mitigation is not required to serve only the users of the development. If improvements or strategies targeted to an off-site location will improve the LOS measurement used by trips generated by the facility in question, then that mitigation would also be an acceptable for the proposed development.

Since most local travel estimation modeling procedures are not technologically capable of accurately predicting or reflecting transit, bicycle, pedestrian or HOV/rideshare trips, jurisdictions are limited in what multi-modal actions are available for mitigation. The modeling limitations are reflected in most LOS standards as they do not account for non-motorized travel and do not count high-occupancy vehicles differently than single-occupancy vehicles. As multi-modalism is often weakly reflected in the LOS measurement, jurisdictions have difficulty proving that multimodal improvements or strategies are well targeted for ensuring that local facilities meet or exceed the LOS standards. This is something of a circular or "Catch-22" problems or challenge.

Limits on Use of Permit Conditions

Conditioning development permits is a very complicated issue in Washington. RCW 82.02.020 limits the ability of local jurisdictions to impose taxes, fees, or other costs upon development either directly or indirectly. The strictness of RCW 82.02.020's language preempts traditional concerns stemming from the application of the federal constitution. The statute does have exceptions for certain programs and types of fees, but it makes no explicit reference to concurrency.

RCW 82.02.020 states that "no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land," except as explicitly provided for in other parts of Chapter 82.02 RCW. Even for the allowed impositions of taxes and fees, the jurisdiction must demonstrate that the charge is "reasonably necessary as a direct result of the proposed development or plat." [RCW 82.02.020.] In 2006, the Washington State Supreme Court ruled that the jurisdictions can satisfy both the "direct result"

provision and a later provision requiring improvements to "reasonably benefit the new development" by calculating the costs of providing infrastructure for all new development within their boundaries and then charging individual developments based upon their proportional share of expected growth without demonstrating that a specific burden or benefit related to the proposed development. [City of Olympia v. Drebick, 156 Wash.2d 289 (2006).]

The "reasonably necessary as a direct result" language of RCW 82.02.020 has the effect of preempting traditional concerns about the federal constitution's Fifth Amendment. [Id.] The Fifth Amendment provides that "private property shall not be taken for public use without just compensation." The United States Supreme Court has held this to mean that permit conditions requiring the dedication of private land to public bodies are unconstitutional unless the jurisdiction can demonstrate that the dedication forms a "nexus" with a potential public harm and that the dedication is "roughly proportional" to the potential harm. Since it is a bedrock principle of law that a constitutional issue will be evaluated if a case can be decided along statutory grounds, RCW 82.02.020 has the effect of replacing the "nexus and proportionality" tests familiar to many planners through the Nollan[3] and Dolan[4] cases and replacing them with the "reasonably necessary as a direct result" test. The most important element of this change is that while the Fifth Amendment protects landowners only against loss of property or property rights, not against imposition of other fees or conditions, the state statute applies to any and all imposition of costs be they "direct or indirect" upon development. [Drebick, 156 Wash.2d 289.]

In addition to prohibiting the imposition of costs of development other than impact fees, the statute goes so far as to prohibit "voluntary agreements for local off-site transportation improvements within the geographic boundaries of the area or areas covered by an adopted transportation program authorized by chapter 39.92 RCW." The combined effect is to prohibit any efforts at concurrency mitigation within an area covered by a transportation impact fee. This result is consistent with the goal of preventing duplicative fees found in 82.02.050(1)(c). If a proposed development in an area with a transportation impact fee would cause a concurrency problem not sufficiently addressed by the six-year capital facilities plan, then the development could not go forward under any circumstances. The developer could not offer to do the improvements or contribute to the improvements, nor could the jurisdiction require them. Neither side could take action other than amending the capital facilities plan and, possibly, the impact fee imposition table. {Stub}

LAND-USE AND COOPERATION POWERS

Multi-modal transportation, especially public transit, depends on certain land-use patterns, such as more dense development resulting in greater concentrations of people to support it. [See RCW 81.104.080.] Local jurisdictions have the land-use authority to create density in numerous ways, including zoning and tax incentives. While land-use

[3] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)
[4] *Dolan v. City of Tigard*, 512 U.S. 374 (1994)

actions are located in individual jurisdictions, their traffic impacts often span multiple jurisdictions of facility ownership if not political boundaries. In order to comply with the consistency requirements, concurrency implementations must implement the land-use element and consider the effects on neighboring jurisdictions. [RCW 36.70A.070(6)(a)(v).] Local jurisdictions do not have to express deference to the plans of neighboring jurisdictions; only consideration is required. [Id.]

Land Use

Land-use planning and transportation planning are formally divided. The separation between land-use planning and transportation planning is present in numerous places within the law. For example, compare RCW 35.77.010, requiring a public hearing to evaluate the transportation plan, with RCW 35.63.100, requiring a public hearing to evaluate the land-use plan. Nothing in either provision prevents them from being held jointly, but nothing requires a joint hearing either. Even the GMA includes language implying that the land-use element is independent from the transportation element. In a comprehensive plan, the transportation plan must "implement" the land-use element, but the land-use element is not similarly bound. [RCW § 36.70A.070(6).]

In rare instances, land-use authority is held without any transportation authority. The community councils that Bellevue has incorporated, for instance, retain land-use control of their geographic regions while possessing no transportation powers of their own. [Bellevue, 119 Wn. App. at 410.] Another instance is the Columbia Gorge Commission, which has the authority to veto developments within three Washington counties and three Oregon counties but is without any transportation powers. [RCW 43.97.015(a)(2),(3),(4).] Such clear separation is unusual, but it highlights the way in which the two powers are often viewed independently. More often, transportation power is held without land-use power; only five areas of the state control both land-use and public transportation: the cities of Everett, Yakima, and Pullman and the unincorporated areas of Garfield and King counties. [Washington State Transportation Resource Manual (Updated January 2005), pg. 297.]

Local jurisdictions cannot use the concurrency provision to prevent development outside their boundaries. Comprehensive plans, though, are required to evaluate the impact of their land-use and transportation decisions on the transportation systems of neighboring jurisdictions. [RCW 36.70A.070(6)(a)(v).] A few jurisdictions, such as Bellevue, have unilaterally decided to disallow concurrency mitigation within its boundaries that would have the effect of shifting concurrency problems to neighboring jurisdictions. [Bellevue Municipal Code 14.10.050(D)(6).]

Transportation Impact Fees

Transportation impact fees are set by each jurisdiction on the basis of the expected costs of accommodated development within a certain area. Certainly, local jurisdictions have the power to encourage/discourage development in certain areas by setting different impact fees for different places within their jurisdiction.

Interlocal Agreements

Interlocal agreements can be used to achieve inter-jurisdictional concurrency, obtain mass transit provision, and enforce lockstep coordination. In Washington state every power that any two or more local jurisdictions have in common can be shared by those jurisdictions. [RCW 39.34.030.] Therefore, local jurisdictions that find it useful may agree with each other to enforce concurrency not only for their own facilities but for each other's. [King County formally provides for just such arrangements. King County Code 14.70.290(B),(D).]

Jurisdictions may also use intergovernmental agreements to engage in partnerships with transit providers. Bellevue, for instance, is part of a long-term partnership with King Country Metro, Sound Transit, and the Bellevue Downtown Association to reduce single-occupancy vehicle trips. Such agreements can be very useful in removing some of the uncertainty associated with service-based accommodations.

Regional Transportation Commission

The 2006 legislature created a new governmental task force in the central Puget Sound region. The Regional Transportation Commission (RTC) is tasked with providing a review and evaluation of transportation planning and provision in the central Puget Sound region. Part of the RTC's task is to propose a "regional transportation governing entity," its powers and funding. This could potentially result in a more regional relationship to coordinated facility and even land use development, but at this time it is too early to do anything more than speculate about the results of the RTC's work. [PL-2871.]

CONCLUSION

At present, nothing in current law prevents multi-modal concurrency. Indeed, many parts explicitly support it, and in theory, all the powers are present to make it a reality. On the other hand, many other laws govern how independent transportation authorities – especially public transit agencies - are to plan and make public decisions about how they serve their constituent areas, and these other laws provide little or no direction or support for better linkages to the decisions and plans made under GMA by local governments. Additionally, current laws do not provide resources for, nor recognize the complexities that are inherently involved in, initiating, negotiating, and finalizing complex intergovernmental agreements that could enable commitments among many separate local jurisdictions and public transit agencies to commit to making future transportation resource and land-use decisions to better support multi-modalism. None-the-less, local jurisdictions do have more potential multi-modal leverage than most are using.

In furthering multi-modal concurrency, a most important legal step is selecting how to measure LOS. Not only does the measurement reflect the jurisdiction's transportation vision for how people and goods will move within its boundaries, but it also begins to determine how funds should be spent to accommodate new transportation demand. Currently, jurisdictions are using the LOS standard well to funnel congestion into selected areas, and they are very successful at working with developers to accommodate

new growth, but their need for better integration of multi-modalism is just beginning to be realized.

Regional LOS coordination is also an important step. Coordination of LOS standards would be more effective if a region employed a uniform LOS methodology. In King County, for instance, most jurisdictions implement LOS differently than their neighbors, making coordination of the LOS standards like coordinating apples with oranges. Empowering counties or RTPOs to propagate a single methodology, or set of compatible methodologies, would enhance regional transportation analysis. The new requirement that RTPOs create a measurement of total multi-modal capacity for regional growth centers creates a regionally applied methodology for the first time. [RCW 47.80.030(1)(f).]